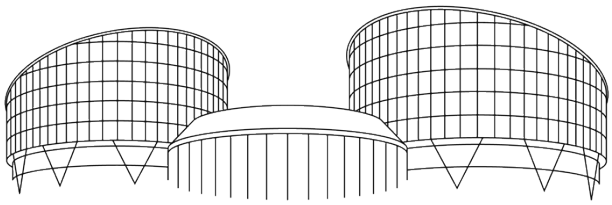

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ÇELİK v. TURKEY (no. 2)

(Application no. 39326/02)

JUDGMENT

STRASBOURG

27 May 2010

FINAL

27/08/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Çelik v. Turkey (no. 2)**,**

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Françoise Tulkens, *President*,
Ireneu Cabral Barreto,
Danutė Jočienė,
András Sajó,
Nona Tsotsoria,
Işıl Karakaş,
Kristina Pardalos, *judges*,
and Sally Dollé, *Section Registrar*,

Having deliberated in private on 29 April 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 39326/02) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Murat Çelik ("the applicant"), on 16 May 2002.

2. The applicant was represented by Ms S. Ballıkaya Çelik, a lawyer practising in İstanbul. The Turkish Government ("the Government") were represented by their Agent.

3. On 11 June 2007 the President of the Second Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1966 and lives in İstanbul. He was a member of the board of directors of the Istanbul Bar Association at the time of lodging the application, and was the Istanbul department director of the Contemporary Lawyers' Association at the time of the events. The applicant also pursued various activities for the furtherance of human rights protection in Turkey.

A. The incident at the Aydın Assize Court

5. On 21 April 1998 the applicant was injured during a commotion amongst the public which took place at the Aydın Assize Court, following the delivery of a verdict convicting six police officers of torturing and killing a detainee. A number of the public consisted of off-duty police officers in civilian clothes, journalists, representatives of various associations and relatives of the victim. The applicant claims that he attended the hearing as one of the legal representatives of the victim's relatives (see paragraph 9 below, however). During the incident seventeen people, including seven police officers, sustained injuries of different degrees of severity.

6. In the application form the applicant maintained that as soon as the sentence of the defendant police officers was read out, the off-duty police officers in civilian clothes and the defendant police officers started to verbally and physically attack the plaintiffs, their lawyers and the victims' relatives. Later the rapid reaction police force entered the court room and started to beat and drag people out of the room. The applicant further claimed that police officers in civilian clothes barricaded the corridor of the Assize Court and attempted to lynch him and others.

7. According to the incident scene report drafted by police officers on duty that day the events unfolded as follows: After receiving information that the hearing would be attended by a substantial number of persons from various cities following a decision taken by various political parties and associations, the police arrived at the courthouse and by 1 p.m. all the necessary security measures had been taken within and outside the perimeter of the courthouse. The security forces were warned to be prepared for possible provocations and all those who had entered the hearing room were searched. The hearing commenced at 3.40 p.m. As soon as the court delivered its verdict at 6 p.m., one of the sisters of the deceased started dancing with her hands in the air and another person shouted out that the justice had been done and that the fascist police would serve their sentence. A verbal and physical confrontation between the two groups ensued. The rapid reaction police officers entered the hearing room and had to use force in order to restore public order. The incident report noted that five persons, including the applicant, who had been injured in the course of the commotion at the courthouse, had been transferred to a doctor for medical treatment.

8. At 6.45 p.m., the applicant was examined by a doctor at the Aydın State Hospital who noted superficial grazes on the right side of the applicant's neck, a superficial cut on his chin and widespread redness on the upper side of his right leg.

B. The criminal investigation

9. On 21 April 1998 the applicant gave evidence to a public prosecutor where he admitted that he had not been representing the plaintiff at the hearing but had been there as an observer on behalf of the Contemporary Lawyers' Association. He claimed that when the judge read out the sentences of the defendants, the plain clothes police officers sitting on the benches started to verbally attack the lawyers and the press. The applicant maintained that a commotion ensued during which he was beaten and dragged out of the courtroom by 5 or 6 plain clothes police officers. He claimed that he realised that they were police officers from the way they acted and that he would be able to recognise them if he saw them.

10. On 22 April 1998 the applicant filed an official complaint with the Bakırköy public prosecutor's office about these events and requested the prosecution of the plain clothes police officers working at the anti-terror branch of the Aydın Security Directorate. He maintained that he would be able to identify the policemen. The applicant asked to be referred to the Forensic Medical Institute for a medical examination.

11. On the same day, the applicant was examined by a doctor at the Bakırköy Forensic Medicine Department, who noted that he complained of pain in the chin area, which bore a cut, that there was a 1 cm bruise on the back of his head, a 2x1 cm bruise on the back of the right femur and that he complained of pain in the upper legs. The doctor concluded that the injuries noted therein rendered the applicant unfit for work for five days.

12. In the meantime, the Izmir Bar Association, Contemporary Lawyers' Association and a number of lawyers filed complaints with the Aydın prosecutor's office condemning the incident and requesting the prosecution of those responsible.

13. On 24 April 1998 the Bakırköy public prosecutor decided that he lacked competence *ratione loci* and transferred the investigation file to the Aydın public prosecutor's office.

14. On 15 May 1998 the Bakırköy Forensic Medicine Department, relying on the applicant's medical report of 21 April 1998, concluded that the injuries noted therein rendered the applicant unfit for work for five days.

C. The criminal proceedings

15. On 27 November 1998 the Aydın public prosecutor filed a bill of indictment against thirteen people, which included two journalists, a local politician and seven police officers at the Aydın Security Directorate on account of, *inter alia*, causing bodily harm within the meaning of Article 456 of the Criminal Code. The Izmir Bar Association, the Aydın Bar Association, the Contemporary Lawyers' Association and nineteen people,

including seven police officers other than those accused, and the applicant were listed as complainants (müşteki) in the indictment.

16. On the same day, as regards the police officers on duty that day, the prosecutor gave a decision of incompetence *ratione materiae* and transferred the investigation file to the Aydın Provincial Office.

17. On 10 February 1999 the applicant requested to join the proceedings as a third party.

18. On 24 March 1999 the applicant submitted a written letter to the Aydın Criminal Court of First Instance requesting the prosecution of the accused police officers. In his letter the applicant repeated that he and others had been physically and verbally attacked by plain clothes police officers, that he had been beaten and taken out of the court room by plain clothes police officers and that the police had attempted to lynch him in the corridors of the courthouse.

19. On 2 April 2001 the Aydın Criminal Court of First Instance decided, in accordance with the relevant provisions of Law no. 4616, that the criminal proceedings should be suspended and subsequently discontinued if no offence of the same or a more serious kind was committed by the offenders within a five-year period.

20. On 26 November 2001 the applicant's objection against the above decision in respect of the seven police officers was dismissed by the Aydın Assize Court.

D. The investigation by the police inspection commission

21. In the meantime, on 23 April 1998, an investigation was instigated by the police inspection commission against thirteen police officers. Two police chiefs ("the investigators") were appointed to prepare a report regarding the incident and allegations of battery.

22. It appears from the report that in the course of its preparation the investigators heard evidence from the accused police officers, other police officers on duty that day, six journalists including those injured that day and a certain Mr E.Y. They examined video footage of two television channels, namely, EGE TV and ATV, as well as photographs and the medical reports of those injured.

23. On 29 May 1998 the report was submitted to the board of investigation, recommending that the board decline authorisation for prosecution in respect of the police officers on duty that day on account of a lack of evidence. The investigators submitted that two police officers who had been off duty that day were being directly investigated by the public prosecutor. The investigators further considered that there was no call for disciplinary punishment as regards the thirteen police officers on account of lack of evidence.

II. RELEVANT DOMESTIC LAW AND PRACTICE

24. The relevant domestic law and practice in force at the material time are outlined in the following judgments: *Okkalı v. Turkey*, (no. 52067/99, § 47, ECHR 2006-... (extracts)), and *Çalışır v. Turkey* (no. 52165/99, §§ 17-19, 21 February 2006).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3 AND 13 OF THE CONVENTION

25. The applicant complained under Articles 3 and 13 of the Convention about the treatment he had received at the Aydın courthouse on 21 April 1998 and about the manner in which the investigation and the ensuing criminal proceedings had been conducted by the authorities, resulting in impunity.

26. The Court considers that these complaints should be examined from the standpoint of Article 3 alone, which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Admissibility

27. The Government asked the Court to dismiss the application for failure to exhaust domestic remedies under Article 35 § 1 of the Convention. They argued that the applicant could have sought reparation for the harm he had allegedly suffered by instituting an action in the civil or administrative courts.

28. The Court reiterates that it has already examined and rejected the Government's preliminary objections in similar cases (see, for example, *Nevruz Koç v. Turkey*, no. 18207/03, § 31, 12 June 2007). The Court finds no particular circumstances in the instant case which would require it to depart from its findings in the above-mentioned applications. Consequently, the Court rejects the Government's preliminary objection.

29. Moreover, the Court finds that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' observations

30. The Government maintained that the applicant had been injured in the course of a fight which broke out between two sides and that the blows he received had not been intentionally inflicted. They further submitted that the State could not be held responsible for the acts committed by police officers while off duty. Finally, the Government affirmed that a meticulous investigation concerning the incident had been conducted by the public prosecutor and the Assize Court.

31. The applicant submitted that he had been severely injured as a result of the force used by both plain clothes police officers and by those on duty. He further maintained that the fact that none of the accused police officers had been injured showed that the incident had been premeditated by the police. The applicant claimed that he had been mentally scarred due to the incident and, particularly, by the fact that pictures and video footage of him being beaten and being dragged out of the courtroom were seen by millions of people both in Turkey and in other countries. He further submitted that the accused police officers had neither been subjected to disciplinary punishment nor prosecuted, and that the investigation concerning the incident had been cursory. Finally, the applicant claimed that the video footage submitted by the Government, while giving an accurate picture of the general incident, were purposely incomplete and did not include scenes showing the facts he alleged.

2. The Court's assessment

32. Article 3 enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including ill-treatment administered by private individuals (see, for example, *E. and Others v. the United Kingdom*, no. 33218/96, 26 November 2002, and *Šečić v. Croatia*, no. 40116/02, § 52, ECHR 2007-VI).

33. In the instant case the Court observes that it is undisputed that the applicant sustained various injuries on 21 April 1998 during the incident at the Aydın Assize Court. After having examined the case file and the documentary and other evidence contained therein and, in particular, the applicant's submissions before the domestic authorities (see paragraphs 10, 11 and 19 above), the Court finds that the evidence submitted by the parties

does not permit it to conclude beyond reasonable doubt that the applicant was subjected by the police officers on duty at the Aydın Assize Court on 21 April 1998 to the type of severe ill-treatment proscribed by Article 3. Moreover, since the plain clothes police officers present at the courthouse were off duty and were acting in their private capacity when they allegedly beat up the applicant, the Court also considers that no direct responsibility can be attached to Turkey under the Convention for their acts as private individuals. In addition, the Court finds no indication that the State authorities had failed to take effective steps to protect the applicant from ill-treatment. In reaching this conclusion the Court has had regard to the fact that various measures had been undertaken by the authorities prior to the incident (see paragraph 7 above), that the applicant was injured in the course of a verbal and physical confrontation which took place between opposing parties when a number of people sustained injury, including police officers (see paragraph 5 above), that the applicant's injuries appear to have been superficial with no lasting consequences and to the fact that the police appear to have intervened promptly after the fight began.

34. However, the Court reiterates that Article 3 further requires that States put in place effective criminal-law provisions to deter the commission of offences against personal integrity, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions, and this requirement also extends to ill-treatment administered by private individuals. In particular, it requires the authorities to investigate allegations of ill-treatment when they are "arguable" and "raise a reasonable suspicion", even if such treatment is administered by private persons (see, in particular, *Ay v. Turkey*, no. 30951/96, §§ 55 and 59-60, 22 March 2005). Moreover, when the official investigation has led to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, must satisfy the gravity requirements of such matters. While there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national courts should not under any circumstances be prepared to allow possibly serious attacks on physical and moral integrity to go unpunished (see *Okkalı v. Turkey*, no. 52067/99, cited above, § 65).

35. In the instant case, the Court observes that a criminal investigation was initiated promptly into the circumstances surrounding the incident at the Aydın Assize Court. This investigation led the prosecutor to indict thirteen people, including seven off-duty police officers for, *inter alia*, causing bodily harm pursuant to Article 456 of the Criminal Code. However, the ensuing criminal proceedings to which the applicant became a party and submitted observations ended without any tangible result due to the suspension of the proceedings against the accused in application of Law no. 4616. In this connection, the Court reiterates its earlier finding in a number of applications that the Turkish criminal law system as applied in

these cases has proved to be far from rigorous and would have had no dissuasive effect capable of ensuring the effective prevention of unlawful acts perpetrated by State agents or private individuals when the criminal proceedings brought against them are suspended due to the application of Law no. 4616 (see *Çelik v. Turkey (no. 1)*, no. 39324/02, § 40, 20 January 2009, *Orhan Kur v. Turkey*, no. 32577/02, § 48, 3 June 2008, *Nevruz Koç*, cited above, § 54, and *Yeşil and Sevim v. Turkey,* no. 34738/04, § 42, 5 June 2007). The Court finds no reason to reach a different conclusion in the present case irrespective of the status of the alleged perpetrators since, as a result of the application of Law no. 4616, the facts were never established by a competent court of law. In this connection, the Court reiterates that the main purpose of imposing criminal sanctions is to restrain and deter the offender from causing further harm. However, these aims can hardly be obtained without having the facts of the case established by a competent criminal court.

36. In view of the above, the Court considers that the criminal proceedings in the present case cannot be said to have had a sufficient deterrent effect on the individuals concerned, or to have been capable of ensuring the effective prevention of unlawful acts such as those complained of by the applicant. There has therefore been a procedural violation of Article 3 of the Convention.

II. OTHER ALLEGED VIOLATION OF THE CONVENTION

37. In the application form, relying essentially on the same arguments as those outlined above, the applicant further complained under Article 6 of the Convention that the authorities' failure to conduct an effective investigation into his complaints of ill-treatment had rendered impossible the punishment of the persons responsible for the injuries inflicted on him or the initiation of civil proceedings against them. Under Article 14 of the Convention the applicant alleged that he had been discriminated against on account of his activities in the sphere of human rights.

38. The Government asked the Court to dismiss the applicant's complaint under Article 14 of the Convention for failure to exhaust domestic remedies under Article 35 § 1 of the Convention. They further considered that Article 6 was not applicable to the instant proceedings.

39. The Court considers the Government's objections to be so closely linked to the substance of the applicant's complaints under this head that it cannot be detached from them. Therefore, to avoid prejudging the merits of the said complaints, these questions should be examined together. As the applicant's complaints are linked to the one examined above they may therefore likewise be declared admissible. However, having regard to the facts of the case, the parties' submissions and its finding of a violation of Article 3 of the Convention above, the Court considers that it has examined

the main legal question raised in the present application. It concludes therefore that there is no need to make a separate ruling under this head (see, for example, *Kamil Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007, *Çelik v. Turkey (no. 1)*, no. 39324/02, § 44, 20 January 2009, *K.Ö. v. Turkey*, no. 71795/01, § 50, 11 December 2007, *Juhnke v. Turkey*, no. 52515/99, §§ 98-99, 13 May 2008, and *Mehmet Eren v. Turkey*, no. 32347/02, § 59, 14 October 2008).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage, costs and expenses

41. The applicant claimed, in total, 20,000 euros (EUR) in respect of pecuniary damage. This sum concerned medical expenses and loss of earnings incurred as a result of his incapacity to work for five days, as well as the costs and expenses incurred both before the domestic courts and before the Court. The applicant submitted legal fee agreements concluded with his lawyer and the Istanbul Bar Association's scale of fees. He further claimed EUR 30,000 in respect of non-pecuniary damage.

42. The Government contested the amounts.

43. As regards the alleged pecuniary damage sustained by the applicant, in respect of alleged medical expenses and loss of earnings, the Court does not discern any causal link between the violation found and the unsubstantiated pecuniary damage claimed. As to the claims concerning costs and expenses, the Court reiterates that an applicant is entitled to reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant EUR 2,000 covering costs under all heads.

44. As to the applicant's claims for non-pecuniary damage, the Court accepts that the applicant must have suffered distress and frustration resulting from the inadequacy of the investigation concerning his alleged ill-treatment. Making its assessment on an equitable basis, the Court awards the applicant EUR 9,000 under this head.

B. Default interest

45. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* the application admissible, unanimously;

2. *Holds* by 5 votes to 2 that there has been a procedural violation of Article 3 of the Convention;

3. *Holds* unanimously that that there is no need to examine separately the complaints under Articles 6 and 14 of the Convention;

4. *Holds* by 5 votes to 2
   (a) that the respondent State is to pay the applicant within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following sums, to be converted into Turkish liras at the rate applicable at the date of settlement:
      (i) EUR 9,000 (nine thousand euros), plus any tax that may be chargeable, for non-pecuniary damage;
      (ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 27 May 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge A. Sajó and N. Tsotsoria is annexed to this judgment.

F.T.
S.D.

JOINT DISSENTING OPINION OF JUDGES SAJÓ AND TSOTSORIA

We agree with our fellow judges that there has been no substantive violation of Article 3 in this case. The applicant suffered injuries that rendered him unfit for work for five days. The Court found that the injuries were not attributable to the State as the plain-clothes police officers with whom the applicant had a fight were acting in their private capacity when they allegedly beat him up. Their acts were found to have been those of private individuals (see paragraph 33 of the judgment). In addition, the Court found "no indication that the State authorities had failed to take effective steps to protect the applicant from ill-treatment" (ibid.).

Notwithstanding the factual finding quoted above, the Court concluded that there had been a procedural violation here because of the impunity of policemen in a situation involving degrading and inhuman treatment. We agree that the authorities have a duty to investigate allegations of ill-treatment when they are "arguable" and "raise a reasonable suspicion", even if such treatment is administered by private persons. Here we follow the majority in referring to *Ay v. Turkey* (no. 30951/96, § 60, 22 March 2005).

On the application of this standard we disagree and to our regret we have to dissent in the present case regarding the finding of a procedural violation of the prohibition of degrading and inhuman treatment.

The requirement defined in *Ay* is, in fact, more specific: "Allegations of treatment contrary to Article 3 of the Convention must be supported by appropriate evidence" (ibid., § 47). In other words, not all injurious treatment, but only ill-treatment that arguably amounts to inhuman and degrading treatment, will trigger these obligations. We find this distinction important not only because this is the standard applied in *Ay* and other cases following it, but also because otherwise the Court would provide protection under the Convention to people who may have suffered injustice but not a human rights violation prohibited by the Convention. Here we follow the uncontested position of the Court as defined in *Perez v. France* ([GC], no. 47287/99, ECHR 2004-I).

We disagree, therefore, with the application in the present case of the standard confirmed in *Ay* (cited above). The applicant failed to formulate an arguable suspicion before the national authorities that he was the victim of inhuman and degrading treatment. In the case of *Ay*, by contrast, after concluding that there had been no violation of the prohibition of *torture* in its substantive aspect, the Court, in its analysis of the arguable allegations raised by the applicant in respect of the investigations into his complaints, did not limit its analysis to the finding of serious wounds, and considered it relevant to examine "the possible involvement of agents of the State" (finding that there had been no violation). In the present case the allegations raised by the applicant, namely that he suffered injuries in the course of a

verbal and physical confrontation between private individuals (see paragraph 33 of the judgment), do not amount to an arguable allegation of inhuman and degrading treatment. This allegation is one of private revenge (as is corroborated by the applicant's Article 6 complaint). He may have substantiated the fact that he suffered injuries that "appear to have been superficial with no lasting consequences" (ibid.) but could not show that this had occurred in a situation that was one of ill-treatment in the sense of inhuman and degrading treatment. We do not believe that the injury itself, suffered in a confrontation with non-State agents, was enough to substantiate his allegations of inhuman and degrading treatment.

In *Tonchev v. Bulgaria* (no. 18527/02, § 40, 19 November 2009) the Court provides the following summary of its case-law:

> "Previous cases in which the Court has found that the State's positive obligations under Article 3 were engaged concerned far more serious instances of ill-treatment: beating with a garden cane applied with considerable force on more than one occasion (see *A. v. the United Kingdom*, 23 September 1998, § 21, *Reports of Judgments and Decisions* 1998-VI), very serious neglect and abuse for a number of years (see *Z and Others v. the United Kingdom* [GC], no. 29392/95, §§ 11-36, 40 and 74, ECHR 2001-V), consistent sexual abuse over a period of years (see *D.P. and J.C. v. the United Kingdom*, no. 38719/97, §§ 66-74, 10 October 2002), extremely serious sexual and physical abuse over a long period of time (see *E. and Others v. the United Kingdom*, no. 33218/96, §§ 43 and 89, 26 November 2002), multiple rape (see *M.C. v. Bulgaria*, no. 39272/98, §§ 16-21, 30 and 153, ECHR 2003-XII), beating all over the body with wooden planks, leading to multiple rib fractures (see *Šečić v. Croatia*, no. 40116/02, § 8, 11 and 51, ECHR 2007-VI), and anal fissure caused by several attackers in highly intimidating circumstances (see *Nikolay Dimitrov v. Bulgaria*, no. 72663/01, §§ 9 and 70, 27 September 2007)."

In *Tonchev* a wilful attack on a five-year-old by a private person resulting in a longitudinal wound on the left eyebrow measuring 11 mm by 3 mm and a bruise on the lower left eyelid measuring 5 mm by 3 mm was not considered to amount to inhuman and degrading treatment. The requirement of such special elements is related to the somewhat exceptional nature of State liability for the acts of non-State agents: "In general, actions incompatible with Article 3 of the Convention incur the liability of a contracting State <u>only if</u> they were inflicted by persons holding an official position. ..." (see 97 *Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia*, no. 71156/01, § 96, ECHR 2007-V). However, in the present case the Court found that the acts of the plain-clothes policemen had not been carried out by persons holding an official position (see paragraph 33 of the judgment).

There is no reason to assume that it is the <u>gravity of the private attack in itself</u> that amounts to inhuman and degrading treatment; it is only a factual element that may contribute to it. In fact, not even demonstrable ill-effects are required for a finding of inhuman and degrading treatment. What matters is how the physical or psychological mistreatment affects human dignity. Treatment is degrading where it was "such as to arouse in the

victims feelings of fear, anguish and inferiority capable of humiliating and debasing them" (see *Kudła v. Poland* [GC], no. 30210/96, § 92, ECHR 2000-XI). It is not by accident that in all the cases cited in the judgment the victims were vulnerable persons: Roma who were subject to an attack in a case where racial motivation could not be ruled out, and where the delays and other shortcomings could be explained in part by racial animus, or children subjected to rape or other mistreatment. The injuries sustained in these cases were rather serious, but, more importantly, in each case they were linked to the vulnerable status of the victims, inevitably increasing their feelings of defencelessness as a result of being at the mercy of towering power. The duties of protection under Article 3 against inhuman or degrading treatment, including such ill-treatment administered by private individuals, imply that "measures should provide effective protection, in particular, of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge" (see *E. and Others v. the United Kingdom*, cited above, § 88, and *97 Members of the Gldani Congregation and Others*, cited above, § 96).

Ill-treatment (especially when it is alleged to have been inflicted by private parties in a fist fight) is not the same as injury, and has to be understood within a structure: "it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim" (see *Jalloh v. Germany* [GC], no. 54810/00, § 67, ECHR 2006-IX).

It is important to remember what kind of "treatment" amounts to *ill*-treatment satisfying the definition of "inhuman" and "degrading":

> "Treatment has been held by the Court to be 'inhuman' because, *inter alia*, it was **premeditated**, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (see *Labita*, cited above, § 120). Treatment has been considered 'degrading' when it was such as to arouse in its victims feelings of fear, anguish **and inferiority capable of humiliating** and debasing them and possibly breaking their physical or moral resistance." (see *Jalloh*, cited above, § 68, emphasis added)

What makes a private physical assault amount to inhuman and degrading treatment is that the defenceless and unwilling person becomes the mere object of the treatment – that is, he or she is not treated as a being endowed with the capacity of choice; this is what dehumanises him or her. Needless to say, this is not the case in a fight, where the protagonists enter into the fight with each other. It is true that injuries requiring five days of convalescence (or even less) have been sustained in many cases where the Court has found Article 3 violations, but in all these cases the injury was caused while the victim was in police custody or otherwise under the control of the State. In these cases it was the situation of subordination and helplessness in the face of an irresistible, overwhelming physical force

(exercised under the auspices of an entity with special obligations) that entailed the humiliation amounting to inhuman and degrading treatment. In the present case there is no indication of any submission or vulnerability-based subordination, nor did the applicant make a credible allegation in this regard; in fact, there was an investigation which concluded that a fight had taken place. The majority, in disregard of this fundamental consideration, replaced the above-mentioned fundamental constituent elements of inhumanity and degradation with the simple fact of an injury proved by a medical certificate. The Court itself found that the wounds had occurred in a fight between private parties, and that none of the structural elements of inhuman and degrading treatment were present. Inhuman and degrading treatment is and should be clearly distinguished from private assault and injury, an unfortunate and unpleasant but normal event in everyday life.

It is true that the proceedings against the policemen were suspended on account of their status, in conformity with Law no. 4616. The Court has found in a number of applications where the police or other armed forces caused injury of a certain gravity to people under their supervision that this law does not ensure the effective prevention of unlawful acts. We have never had any difficulty in finding a violation of the procedural limb of Article 3 in such situations. In certain situations an impression of total impunity may contribute to a dehumanising form of dependence. However, the mere possibility of impunity does not turn private assault into a situation where the protagonists in a fist fight act with a sense of impunity. The impunity offered by Law no. 4616 does not result in commanding supremacy as far as the alleged aggressor is concerned. Nor will the "civilian" participant in the confrontation be in a situation of defenceless vulnerability on account of the possible impunity of his opponent.

According to the Court's well-established case-law, the submission that "the police officers acted with impunity has no merit. Article 3 does not entail the right for an applicant to have third parties sentenced for a criminal offence or an absolute obligation for all prosecutions to result in conviction, or indeed the imposition of a particular sentence (see, *mutatis mutandis*, *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I, and *Tanlı v. Turkey*, no. 26129/95, § 111, ECHR 2001-III)" (see *Pütün v. Turkey* (dec.), no. 31734/96, ECHR 2004-XII).

Disregard for the structural elements of ill-treatment not only runs counter to the very concept of degrading and inhuman treatment. It is irreconcilable with the fundamental notions of our established case-law, to the effect that human rights violations are to be treated differently from other injustices or inconveniences, which are not the business of the Court. It is a firmly rooted principle in the Court's case-law that neither the Convention nor its Protocols guarantee any right as such to press criminal charges against third persons or to have them convicted (see *Perez*, cited above, § 70). The Court, with its limited resources, and being entrusted with

the protection of human rights only, cannot undertake the role of the protector of all injured victims in the event that the domestic legal system fails to provide them with a remedy for injuries other than those falling within a very specific category, namely where the injury constitutes a human rights violation. The Court has clearly stated that the Convention should not become a tool of private revenge, even if the motives behind the search for justice (of which revenge is only one form) apparently satisfy the moral intuitions of some applicants.